U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: September 9, 1998
Case No. **98 INA 100**

In the Matter of:

JOSEPH KHABBAZ & COMPANY,
Employer,

on behalf of

MARIN FILO,
Alien.

Appearance: Eliezer Kapuya, Esq., of Los Angeles, California, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MARIN FILO ("Alien") by JOSEPH KHABBAZ & COMPANY ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the State Employment Security Service ("SESA") and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On May 18, 1994, the Employer applied for alien labor certification on behalf of the Alien for the position of Credit Analyst in its Italian Imported Furniture Sales business. Employer described the Job to Be Performed as follows:

> Will analyze paying habits of customers who are delinquent in payment of bills, and will recommend action. Will review files to select delinquent accounts for collection efforts. Will confer with credit representatives of credit associations to exchange info credit ratings and other clientale information. Will recommend action with accounts.

AF 47 (Quoted verbatim without correction or change.)[2] On the basis of the Employer's description, the job was classified as "Credit Analyst" under DOT Occupational Code No. 241.267-022.[3] The SESA reported that it referred twenty-two U. S. workers for the job and that no U. S. worker was hired for the position. AF 46.

Notice of Findings. On September 30, 1996, the CO issued a Notice of Findings ("NOF") advising that certification would be denied, subject to Employer's Rebuttal. AF 42-45. (1) The CO noted the definition of "Employer" under 20 CFR § 656.3, and observed that the

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[2]The wage offered was $13.51, per hour for a forty hour week from 9:00 AM to 9:00 PM, with no overtime. Although no formal education was specified, the Employer required two years in the Job Offered or in he Related Occupations of Real Estate Sales or Loan Application Processing. The Alien's qualifications made no reference to her education, but stated that she was employed in real estate sales in Glendora, California, from August 1991 to April 30, 1994, the date she signed the application. Her duties in that occupation were, "Sells real property and processes loan applications for investors and buyers." AF 181-182.

[3]**241.267-022 CREDIT ANALYST (clerical)** Analyzes paying habits of customers who are delinquent in payment of bills and recommends action: Reviews files to select delinquent accounts for collection efforts. Evaluates customer records and recommends that account be closed, credit limit reduced or extended, or collection attempted, based on earnings and savings data, payment history, and purchase activity of customer. Confers with representatives of credit associations and other businesses to exchange information concerning credit ratings and forwarding addresses. Interviews customers in person or by telephone to investigate complaints, verify accuracy of charges, or to correct errors in accounts [BILL ADJUSTER (clerical)]. *GOE: 07.01.04 STRENGTH: S GED: R4 M3 L4 SVP:5 DLU: 81*

term referred to a business entity that currently had a location in the United States, that the Employer's application represented that it could place the Alien on payroll upon entry into the United States, and that the job was clearly open to any qualified U. S. worker. The CO questioned whether (i) the Employer had a current job opening, (ii) was operating an on-going business, and (iii) could provide permanent, full-time employment.[4] (2) Citing 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii), the CO found a lack of specificity in the Employer's report of its rejection of U. S. workers and insufficient recruitment effort of the Employer. Based on Employer's documentation, the CO concluded that it rejected the following U. S. workers for reasons that were neither lawful nor work-related: Accosta, Acero, B. Fierro, Loveless, McCall, Rivera, Shannon, Sheffield, Valencia, Walker, and Zheng. The CO further found that (i) between May 25, 1995, and June 29, 1995, the SESA had sent nineteen resumes to the Employer; (ii) that the Employer did not attempt to contact the qualified applicants Elisaldez, A. Fierro, Jones, Lyman, Magers, Martin, McCoy, and Rajaei until July 10, 1995; and (iii) the Employer failed to interview the applicant McCoy.[5] The CO then described the evidence required to rebut these findings.

Rebuttal. On October 16, 1996, the Employer filed its rebuttal addressing the issues discussed in the NOF. AF 05-41. The rebuttal included a statement by Employer's owner, and various exhibits supporting Employer's assertions in response to the NOF conclusions as to the existence of a current opening for permanent, full-time employment in the Job Offered.

Final Determination. The CO denied certification by the Final Determination issued December 10, 1996. AF 03-04. (1) After considering the Employer's rebuttal evidence and the entire record the CO found that its income tax records for 1994 had reported a loss of $2,000 on sales of $2,000,000, that it had paid only $44,000 in wages, and that no evidence later than 1994 supported a finding that it had the financial capacity to pay the wages offered in its application. Viewed as a whole, said the CO, the evidence of record convincingly established that the Employer was not able to provide permanent, full-time employment under the terms and conditions stated in its application.

(2) In response to the NOF finding that applicants were not given specific, job-related reasons for rejection the Employer said eleven of the candidates had, in fact, withdrawn from consideration and that it had tried to reach the eight applicants who were not given a good faith recruitment effort as soon as it could. (i) The CO said job applicants Acero, Accosta, Loveless, Valencia, and Walker all were qualified because their resumes indicated two years of experience in credit analysis, real estate sales, or loan application processing, the activities that the Employer had defined as related to and qualifying experience for this job. (ii) The CO rejected the rebuttal evaluation of Employer's delay, pointing out that the time elapsed ranged between

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[4] Subject to the rebuttal evidence, the CO found that a reasonable doubt existed as to whether the job Employer offered was a *bona fide* opening to which a U. S. worker might successfully be referred, interviewed and hired.

[5] Relying on the education and experience described in the resumes of the job applicants, the CO found that the evidence of record indicated that these U. S. workers apparently were qualified to perform the job duties described in Employer's application and should have been timely contacted and interviewed for the position.

thirty-eight and forty-seven days, "a very long delay." Consequently, the CO was not convinced that the Employer made timely contact with Elisaldez, Jones, Magers, Martin, and Rajaei, who were qualified applicants. For these reasons the CO denied certification.

Appeal. Employer requested reconsideration and administrative-judicial review on January 6, 1996. AF 02. The CO denied reconsideration on January 24, 1997, and the Appellate File was then referred to BALCA.

Discussion

After examining the application, NOF, rebuttal, Final Determination and the appeal, the Panel agrees that the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proving that the position it offered was a *bona fide* job opportunity to which U. S. workers could be referred. **H. C. LaMarche Enterprises**, 87 INA 607 (Oct. 27, 1988). Although the words "*bona fide* job opportunity" do not appear in the regulations, 20 CFR § 656.20(c)(8) was interpreted as follows by the U. S. District Court in **Pasadena Typewriter and Adding Machine Co., Inc., and Alirez Rahmaty v. United States Department of Labor** , No. CV 83-5516-AABT, (C.D. Cal., 1987):

> The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be *bona fide* adds no substance to the regulations but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of § 656.20(c)(8). Likewise, requiring that the job opportunity be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of § 656.50.[6]

It is well-established that an employer has the burden of proving that a *bona fide* job opportunity exists that is open to U. S. workers. **Amger Corp.**, 87 INA 545 (Oct. 15, 1987) (*en banc*), as cited in **State of California Dept. of Consumer Affairs**, 94 INA 396 (Jul. 18, 1995). In addition to proving the legitimate nature of its business, the Employer was required to show that a *bona fide* job actually existed. **Atherton Development & Engineering Corp.**, 92 INA 422 (May 11, 1994). The CO found that, unlike the parties in **Simcha Productions**, 93 INA 545 (Jul. 17, 1995), this Employer could not prove that it had adequate funds to pay the hourly wages it offered for this position. While its tax return demonstrated that its gross annual volume for 1994 was impressive, the Employer's own evidence of the funds it had available for wages and salaries further showed that its business could not pay the advertised wage to the U. S. workers referred for the job, regardless of whether or not it proved that it was a viable and successful business entity. **AZ Air Conditioning & Heating**, 94 INA 139 (Apr. 28, 1995). It follows that the evidence of record supported the CO's denial of alien labor certification.

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[6] 20 CFR § 656.50 was later recodified as 20 CFR § 656.3.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.